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No.

In The

Supreme Court of the United States

October Term, 1996

RONALD KIDD and THOMAS HAMPTON, on behalf of others similarly situated,

Petitioners,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES OF AMERICA, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the plaintiffs and the class they seek to represent can be denied the right to proceed in district court under the guise of enforcing an agreement to arbitrate a dispute when the terms of the agreement prohibit arbitration?

2. Whether the law-of-the-case doctrine can bar this action from proceeding when the mandate of the Eleventh Circuit in *Kidd I* was issued before the claims were submitted to arbitration and subsequently rejected, and Equitable failed to notify the Eleventh Circuit that the rules of the NASD governing arbitration had changed in a manner that directly and unequivocally barred Equitable from compelling arbitration of Kidd and Hampton's class claims?

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Ronald Kidd and Thomas Hampton respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals (App. 1a) was not reported. The judgment and opinion of the lower court is unreported. (App. 14a).

STATEMENT OF JURISDICTION

The Eleventh Circuit released its decision on June 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved in this appeal are 42 U.S.C. § 1981, 42 U.S.C.A. § 2000e-2, § 2000e-5, as well as 9 U.S.C.A. § 4 and 15 U.S.C. § 78*o*-3, they are reproduced in its entirety in Appendix 24a.

STATEMENT OF THE CASE

Petitioners, Ronald Kidd and Thomas Hampton, sued Equitable Life Assurance Society of America (hereinafter "Equitable") in the district court for the Northern District of Alabama. The Complaint was filed on or about January 21, 1993.

A. The Underlying Action

1. Statement of Facts

Kidd was hired as a sales agent for Equitable in March of 1978. R1-22-¶ 3. In November of 1978, he signed a U-4

application that contained a provision binding him to "abide by the Statute(s), Constitution(s), Rules, and By-laws, as . . . amended from time to time of the [NASD]." *Kidd v. Equitable Life Assurance Society of America*, 32 F.3d 516, 517 (11th Cir. 1994) (hereinafter "*Kidd I*"). In 1983, Kidd executed another U-4 form that had been amended to contain a provision requiring the applicant to submit "any dispute to arbitration, claim or controversy between me and my firm *required to be arbitrated under the rules, constitutions or bylaws of the NASD*." *Id.* (emphasis added).

Hampton was hired as a sales agent for Equitable in 1987, at which time he also signed a U-4 application with a compulsory arbitration clause. *Id.*

Kidd and Hampton both filed charges of discrimination with the EEOC, alleging, *inter alia*, race discrimination with regard to promotions and hiring against themselves and/or a class of African-American employees and applicants. *Id.* at 518 n.2. Subsequently, Kidd and Hampton filed suit in district court for the Northern District of Alabama, raising claims on behalf of themselves and similarly situated African-American employees and applicants of Equitable. Equitable moved to compel arbitration of their claims, and the district court denied the motion. Equitable appealed to the Eleventh Circuit Court of Appeals and that court reversed and remanded. *Kidd I*, 32 F.3d at 520. On remand, the district court entered an order compelling arbitration and dismissing Kidd and Hampton's case "without prejudice [to their right] to cause . . . reinstatement [of their claims] upon exhaustion of the arbitration procedures . . . ." R1-27-1.

Thereafter, Kidd and Hampton submitted their claims on three different occasions to the NASD for arbitration. R1-28-¶ 3. On each occasion, the NASD refused to accept their claims

because Section 12(d) of the NASD Code of Arbitration Procedure prohibited arbitration whenever a complainant has "initiated in court a putative class action or is a member of a putative or certified class." *See* 59 Fed. Reg. at 22,033. Section 12(d) had been amended "to clarify that the prohibition against seeking to enforce an agreement to arbitrate applies not only to class actions in which a claimant is a customer, but to class actions in which an associated person or a member is a party." *Id.* The NASD Code of Arbitration Procedure also made clear that "[t]he prohibition would extend to all claims encompassed by the class action." *Id.* The Securities and Exchange Commission, approving the amendments to Section 12(d), explained the rationale for the change as follows:

> Over the years of the evolution of class action litigation, the courts have developed the procedures and expertise for managing class actions. Duplication of the often complex procedural safeguards necessary for these lawsuits is unnecessary. The Commission also believes that access to the courts for class action litigation should be preserved for associated persons and member firms as well as for investors and that the rule change approved herein provides a sound procedure for the management of class actions. The proposed rule change also should prevent wasteful litigation over the possible applicability of agreements to arbitrate between members or between a member and a person associated with a member notwithstanding the exclusion of class action claims from NASD arbitration. Based on the above, the Commission believes that the rule change herein approved should promote the

> efficient resolution of these class action disputes. For these reasons, and for the reasons stated above, the Commission believes that the proposed rule change satisfies the requirements of Section 15A(b)(6) of the Act.

Id.

The NASD amended Section 12(d) after the briefs were filed in the first appeal of this action, and the amended section was not addressed by Eleventh Circuit in that appeal. Kidd and Hampton's agreements with Equitable required them to arbitrate only insofar as required by the NASD Code of Arbitration Procedures "as amended from time to time." At the time that arbitration was compelled on remand, the version of Section 12(d) that was before this Court in the last appeal was no longer in existence.

When the Eleventh Circuit decided *Kidd I*, Equitable contended that the prohibition regarding arbitration of class actions or claims of putative class members did not apply to Kidd and Hampton's claims. It argued:

> Section 12(d) of the NASD Code of Arbitration Procedure applies only to *class action* claims involving *investor* disputes, not to *individual* claims of *employment discrimination* such as Mr. Kidd's and Mr. Hampton's. The express language, "legislative history", and context of Section 12(d) all lead to this result.
>
> * * *

Section 12(d) consists of three operative paragraphs, none of which, by its plain language, applies to this case. Paragraph (1) of Section 12(d) reads as follows: "A claim *submitted as a class action* shall not be eligible for arbitration under this Code at the Association." NASD Manual, ¶ 3712(d)(1) (emphasis supplied). Paragraph (1) does not apply because neither Appellee nor Equitable has submitted any class action claim for arbitration. (quotation of Rule omitted).

* * *

NASD Manual ¶ 3712(d)(2) (emphasis supplied). But its express terms, Paragraph (2)(d) does not apply. It contemplates situations in which an *individual who is a member of a putative or certified class* already underway *files a claim* seeking arbitration of his individual claim. Plainly, neither Mr. Kidd nor Mr. Hampton is seeking to submit to arbitration.

Paragraph (3) of Section 12(d) addresses the procedural posture at issue in this case, that is, an NASD member's (Equitable's) effort to enforce an arbitration agreement. But the plain language of this paragraph limits its applicability to situations in which the *person against whom arbitration is sought is a customer* belonging to a certified or putative class action. (quotation of Rule omitted).

* * *

> NASD Manual ¶ 3712(d)(3) (emphasis supplied). Although Paragraph 3 is the most directly applicable portion of the new rule, it relates only to enforcement of arbitration agreements with *customers*. Thus, Section 12(d) was not intended to and does not bar an NASD member from enforcing contractual agreements to arbitrate *individual employment discrimination* claims.

Kidd I, Brief of Appellant ("Equitable"), pp. 26-29 (filed September 27, 1993) (emphasis in original).

Clearly, the issues before the Eleventh Circuit in *Kidd I* were: (1) whether the exclusion of Section 12(d)(1) applied in a situation in which the plaintiffs' claim had not yet been "submitted as a class action"; and (2) whether the exclusion of Section 12(d) applied to just customer-related disputes or included employment-related class actions. The decision in the first appeal did not discuss either of these issues, but simply stated, in a footnote, that the court had rejected Kidd and Hampton's contention that arbitration was not required under Section 12(d). *Kidd I*, 32 F.3d at 518 n.4. By "rejecting" Kidd and Hampton's contention, the Eleventh Circuit apparently accepted Equitable's arguments that the class claim exclusion of Section 12(d) did not apply because Kidd and Hampton's claims had not yet been submitted to NASD and rejected, and that the NASD Code of Arbitration Procedures did not preclude arbitration of employment-related class actions. The recent amendments to Section 12(d) and the NASD's rejection of arbitration of Kidd's and Hampton's claims on three different occasions have now established that their claims are not subject to arbitration.

2. Course of Proceedings and Disposition Before the District Court

On January 21, 1993, Kidd filed this case, alleging that Equitable discriminated against him on the basis of his race, African-American. R1-1. The complaint was amended to add Hampton and allegations of classwide race discrimination. R1-4. In March of 1993, Kidd and Hampton filed a second amended complaint adding James W. Brown as a class representative. R1-9, R1-10. Thereafter, Equitable filed a motion to compel arbitration. R1-11. The district court denied the motion without opinion, R1-11, and Equitable appealed. R1-24.

On appeal, the Eleventh Circuit Court of Appeals reversed the district court and remanded the case "for further proceedings consistent with [its] opinion." *Kidd I*, 32 F.3d at 520.

On remand, the district court entered an order granting Equitable's motion. R1-27. The order also dismissed the claims of Kidd and Hampton, "without prejudice to the right of plaintiffs to cause its reinstatement upon exhaustion of the arbitration procedures." *Id.* Brown's "intervention" and the second amended complaint were ordered to be treated as a new action and given a new case number. *Id.*

After dismissal, Kidd and Hampton submitted their claims to the NASD for arbitration on three different occasions. *See* R1-28-¶ 3. On each of those three occasions, the NASD refused to accept their claims for arbitration because the amendment to § 12(d) of the NASD Code that precludes arbitration if the complainant "has initiated in court a putative class action or is a member of a putative or certified class." 59 Fed. Reg. 22,032, 22,033 (1994). After the NASD refused to accept their claims, Kidd and Hampton filed a "Motion to End Stay of Proceedings and to Reinstate Kidd and Hampton Cases to Active Status." R1-28.

The district court denied the motion to reinstate because it believed reinstatement was foreclosed by the Eleventh Circuit's decision in *Kidd I*. It held:

> The practical effect of the circuit's decision in *Kidd* is to bar as Fed. R. Civ. P. 23 class representatives all securities sales agents who have executed employment contracts ("U-4 forms") with their employers. It may be safely assumed that all employed securities sales agents execute U-4 forms as a condition of their employment. Though the *Kidd* opinion does not speak directly to the issue, the circuit panel surely realized that the arbitration requirement imposed on securities sales agents disqualifies them from serving as class representatives in employment cases to be litigated in court. The *raison d'etre* of arbitration is the avoidance of litigation.
>
> Although this judge disagrees with the circuit's decision and mandate, he is bound by it. The Motion to Reinstate therefore must be overruled. On appeal, the court will not at all be displeased by a reversal on this issue.

R1-31-2. The district court did not discuss the fact that Kidd and Hampton are without a forum to determine their claims of racial discrimination in employment opportunities. The district court entered its final judgment in favor of the Equitable against Kidd and Hampton. R1-33. Kidd and Hampton filed a timely notice of appeal. R1-34.

B. Proceedings Below

Jurisdiction in the Eleventh Circuit Court of Appeals was pursuant to 28 U.S.C. § 1291, as this was an appeal from a final judgment.

The Eleventh Circuit's panel opinion, which is not published, states that the district court correctly held that "reinstatement [of the present action in district court] was foreclosed by this court's holding in *Kidd I*." *Kidd II*, slip op. at p. 3. The panel went on to state:

> The law of the case established in *Kidd I* controls this appeal. None of the exceptions to the law of the case doctrine apply here. Neither the relevant law nor the facts has changed.[footnote 1] Nothing contained herein, however, constitutes any opinion as to the rights, if any, of the putative class members in this action to the arbitration of their individual claims as contemplated in their employment contracts with Equitable. The judgment is AFFIRMED.
>
> [footnote 1] Plaintiffs argue that a clarifying amendment to NASD's Code of Arbitration Procedures Section 12(d)(3)[,] which prohibits arbitration of class claims, exempts this appeal from application of the law of the case. Equitable notes the change was only a clarification. In any event, it is clear that the precise issue on appeal — the enforceability of plaintiffs' employment contracts — was clearly before the district court and the prior panel of this court.

Id.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE ELEVENTH CIRCUIT REWRITES THE ARBITRATION AGREEMENT BETWEEN THE PARTIES.

A. Contract Requires Arbitration Through NASD And In Accordance With NASD Rules.

The panel opinion states, "plaintiffs' employment contracts required them to arbitrate their claims." *Kidd II*, slip op. at 2. The Federal Arbitration Act (FAA), section 4, requires a district court to enforce an arbitration agreement "in accordance with its terms." 9 U.S.C.A. § 4. The "plaintiffs' employment contracts," however, specifically required them to arbitrate disputes pursuant to the rules of the NASD. *See Kidd I*, 32 F.3d at 517. The rules of the NASD prohibit arbitration of class claims, as well as the claims of putative class members. Moreover, the rules bar any NASD member or its associated persons from seeking to enforce an agreement to arbitrate against any member or associated person if that member or associated person has initiated in court a putative class action or is a member of a putative or certified class.

The amended section states:

> *No member* or associated person *shall seek to enforce any agreement to arbitrate against* a customer, other member or *person associated with a member who has initiated in court a putative class action or is a member of a putative or certified class with respect to any claims encompassed by the*

> *class action* unless and until: (A) The class certification is denied; (B) the class is decertified; (C) the customer, other member or person associated with a member is excluded from the class by the court; or (D) the customer, other member or person associated with a member elects not to participate in the putative or certified class action, or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.

59 Fed. Reg. 4299 (emphasis added). Indeed, the amended section specifically addresses contentions made by Equitable in *Kidd I* regarding the arbitrability of class claims:

> [S]ome respondents have argued that class action encompassing such claimants can be submitted to arbitration under the Code. *The NASD has determined that the original intent of the section was to exclude class action claims by associated persons, including employment-related claims, and other industry class actions from arbitration, as well as customer-related class actions.* Accordingly, the NASD is proposing to amend Section 12(d)(3) of the Code to clarify that the prohibition in the provision is total and encompasses class actions in which a member or an associated person may be the subject of a class action.

Id. (emphasis added).

The rationale for the rule change was expressed as follows:

> The NASD determined that the original intent of the section was to exclude class action claims by associated persons, including employment-related claims, and other industry class actions from arbitration, as well as customer-related class actions. . . .
>
> * * *
>
> The [Securities and Exchange] Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD and, in particular, the requirements of section 15A(b)(6) of the Act.[1] Section 15A(b)(6)

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1. Section 15A(b)(6), codified as 15 U.S.C. § 78*o*-3(b)(6), states:

> The rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commission, allowances,

(Cont'd)

> requires, inter alia, that the NASD's rules be designed to prevent fraudulent and manipulative acts, promote just and equitable principles of trade, and protect investors and the public interest. *Over the years of the evolution of class action litigation, the courts have developed the procedures and expertise for managing class actions. Duplication of the often complex procedural safeguards necessary for these lawsuits is unnecessary. The Commission also believes that access to the courts for class action litigation should be preserved for associated persons and member firms as well as for investors and that the rule change approved herein provides a sound procedure for the management of class actions.*

59 Fed. Reg. 22,032, 22,033 (1994) (emphasis added). The proposed rule change also stated that it "should prevent *wasteful litigation over the possible applicability of agreements to arbitrate between members or between a member and a person associated with a member notwithstanding the exclusion of class action claims from NASD arbitration.*" *Id.* (emphasis added).

The rules of the NASD exclude class actions and individual claims of putative class members from arbitration. The NASD rules govern the arbitrability of disputes pursuant to the parties'

(Cont'd)

> discounts, or other fees to be charged by its members, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the association.

agreement. The action of the Eleventh Circuit by refusing to reinstate this action after the NASD rejected the claims for arbitration has effectively re-written the agreement.

B. NASD Refused To Arbitrate Therefore, The Action Should Be Reinstated In The District Court.

Kidd and Hampton exhausted their arbitration remedies by filing with the NASD. The NASD refused to arbitrate the claims, in accordance with its established rules. Kidd and Hampton have thus complied with the arbitration agreement as ordered in *Kidd I*.

Because the NASD, under whose rules the parties have agreed to arbitrate, has demonstrated through its rules and its actions that this dispute is not arbitrable, the petitioners' remedy lies in district court. The failure of that court to reinstate their case violates the parties' agreement, as demonstrated by the NASD Code of Arbitration Procedures, and the failure to reinstate the case effectively eliminates any forum for Kidd and Hampton's class claims.

The Eleventh Circuit failed to address this issue in any meaningful manner, leaving Kidd and Hampton with no explanation as to why only that portion of the agreement regarding compelled arbitration is to be followed, but not that portion of the agreement that incorporates the NASD Code of Arbitration Procedures.

Also, in the *Kidd II* appeal, Equitable argued that Kidd and Hampton should have abandoned their class claims in order to comply with their agreement to arbitrate; however, the only agreement they made was to arbitrate according to NASD rules. Those rules permit Kidd and Hampton to pursue their individual and class claims *in court* and *bars* Equitable from seeking to

compel arbitration when they make that election. As the Supreme Court has said, "named plaintiffs . . . [have a] *right* as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their *individual claims*." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980) (emphasis added). This Court recognized plaintiffs' "right to assert *their own claims* in the framework of a class action" and has held that "[t]he use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs." *Id.* at 338, *see also Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986).

Thus, Equitable's argument below was no more than that Kidd and Hampton should have abandoned their right to benefit from a class action approach to their individual claims merely to accommodate Equitable's subjective preference for arbitration. *See Deposit Guaranty*, 445 U.S. at 332. Once the NASD and SEC elected to amend their rules to protect Kidd and Hampton's right to pursue their individual claims through a class action in district court instead of through an individual arbitration, they had a right to pursue that course.

II.

THE LAW-OF-THE-CASE DOCTRINE CANNOT BAR THIS ACTION FROM PROCEEDING WHEN THE MANDATE OF THE ELEVENTH CIRCUIT IN *KIDD I* WAS ISSUED BEFORE THE CLAIMS WERE SUBMITTED TO ARBITRATION AND SUBSEQUENTLY REJECTED, AND EQUITABLE FAILED TO NOTIFY THE ELEVENTH CIRCUIT THAT THE RULES OF THE NASD GOVERNING ARBITRATION HAD CHANGED IN A MANNER THAT DIRECTLY AND UNEQUIVOCALLY BARRED EQUITABLE FROM COMPELLING ARBITRATION OF KIDD AND HAMPTON'S CLASS CLAIMS.

A. The Mandate Of The Eleventh Circuit In *Kidd I* Did Not Resolve The Issue Of Whether The Claims Could Be Reinstated In The District Court If/When Rejected By The NASD When Submitted For Arbitration.

The Eleventh Circuit's decision in *Kidd I* rejected Kidd and Hampton's argument that "§ 12(d) . . . precluded arbitration of their disputes." *Kidd I*, 32 F.3d at 518 n.4. However, that decision was issued *before* the disputes were submitted to and rejected by the NASD. Therefore, the Eleventh Circuit's mandate, compelling arbitration, could not have addressed the issue in *Kidd II* that did not exist at that time — whether the case should be reinstated to the district court's docket after the NASD had rejected its submission for arbitration.

This Court has held:

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court,

> and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. . . . But the Circuit Court may consider and decide any matters left open by the mandate of this court . . . .

In re Sanford Fork & Tool Co., 160 U.S. 247, 255-56 (1895).

The court in *Kidd I* held that Kidd and Hampton, by virtue of their agreement, were obligated to arbitrate "any dispute, claim, or controversy between [the agents and Equitable] that is required to be arbitrated under the rules, constitutions, or other bylaws of the NASD." *Kidd I*, 32 F.3d at 520. The Eleventh Circuit in *Kidd I* did not presume to decide for the NASD what its own rules meant or to order the NASD to accept Kidd and Hampton's claims for arbitration regardless of its interpretation of its own procedures. *See In Re Salomon, Inc. Shareholders' Derivative Litigation*, 68 F.3d 554, 557-58 (2d Cir. 1995) (Court could not compel arbitration, after NYSE, the arbitral forum selected in the agreement, declined to arbitrate the dispute).

The decision in *Kidd I* accepted Equitable's argument that Section 12(d) of the NASD Code did not *yet* apply because those claims had not been submitted to the NASD, and it rejected Kidd and Hampton's argument that it would be futile to submit their claims for arbitration because the NASD would *probably* reject them. By rejecting Kidd and Hampton's contention that

it would be futile to submit their claims to the NASD so that organization could apply its own rules and decide whether to accept such claims for arbitration in whole or in part, the Eleventh Circuit in *Kidd I* did not reach beyond its jurisdiction to decide the present controversy, which did not exist at that time, — that is, should this case be reinstated in the district court after the NASD has rejected Kidd and Hampton's submission.

Compliance with the Eleventh Circuit's mandate in *Kidd I* was a necessary preliminary step to adjudication of the class claims. It was not a *substitute* for adjudication of the claims. Nothing in the Eleventh Circuit's opinion explicitly addressed the status of the claims after submission to arbitration. That case did not decided the then-hypothetical question of what would happen if the claims were rejected by the NASD based upon its Code of Arbitration Procedures. *See Association for Children for Enforcement of Support, Inc. v. Conger*, 899 F.2d 1164, 1166 (11th Cir. 1990) ("We do not generally decide cases based on a party's *predicted* conduct.") (emphasis added). In any event, the class claims would still be pending ("stayed") and not yet adjudicated.

The district court and the *Kidd II* decisions to the contrary are clearly erroneous because both presume that the *Kidd I* decision intended for the class claims to remain without a remedy in federal court. The *Kidd I* court said no such thing. The wrong — classwide discrimination based upon race — was not the subject of the *Kidd I* decision. The *Kidd I* court held that Equitable was entitled to compel arbitration based on the U-4 forms, containing agreements to arbitrate. *Kidd I*, 32 F.3d at 520. The Eleventh Circuit never held that the district court was without authority to adjudicate whatever claims remained unadjudicated after submission to arbitration.

The district court recognized the plain unfairness of

permitting the wrong of classwide discrimination to go unremedied when it stated in its order that it would welcome reversal. But the district court had no need to feel bound to refuse the reinstate. In addition to the basic fairness of the point (*i.e.*, that the Eleventh Circuit could not have intended to eliminate any possible remedy for the wrong of classwide discrimination), there is a Constitutional basis for reading the mandate as written. The Constitutional basis is the "case or controversy" jurisdiction as embodied in the concept of ripeness. *See* U.S. Const., Art. III, sec. 2, cl. 1; *see also Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 297-98 (1979). The mandate as written requires submission of the claims to the arbitrator, but does not expressly require that the claims are forbidden from returning to the district court after submission. The district court implied that it was forbidden to reinstate the claims, which was error because the issue of what would happen after submission was not ripe.

The concept of justiciability derives from the "case or controversy" requirement in Article III, § 2 of the United States Constitution.[2] *See New Mexicans for Bill Richardson v. Gonzales*,

2. U.S. Constitution, Art. III, § 2, cl. 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizen thereof, and foreign States, Citizens or Subjects.

64 F.3d 1495, 1498-99 (10th Cir. 1995). There are two aspects of the concept of justiciability — ripeness and standing. *Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756 (11th Cir. 1991). " 'Ripeness is peculiarly a question of timing,' intended 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.' " *New Mexicans*, 64 F.3d at 1499 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974) and *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). There are two concerns in any ripeness analysis — constitutional concerns and prudential concerns:

> And where ripeness is the issue . . . the justiciability analysis . . . takes on a more particularized form consisting of two essential inquiries: Do the conflicting parties present a real, substantial controversy which is definite and concrete rather than hypothetical or abstract? If so, is the factual record nonetheless too undeveloped to produce a well-reasoned constitutional decision?

Hallandale, 922 F.2d at 760 (citing *Babbitt v. United Farm Workers National Union*, 442 U.S. at 300-01). " 'The central concern [of the ripeness doctrine] is whether the case involves uncertain and contingent future events that may not occur at all.' The proper time to decide [such an] issue is when a concrete dispute . . . takes shape." *Warner Cable Communications v. Niceville*, 911 F.2d 634, 642 (11th Cir. 1990) (quoting 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3532.1, at 112 (2d ed. 1984)) (internal citation omitted), *cert. denied*, 501 U.S. 1222 (1991); *see also Federal Election Commission v. Lance*, 635 F.2d 1132, 1138 (5th Cir.) ("An

important factor in considering ripeness is whether the issue involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation and citation omitted)), *cert. denied*, 453 U.S. 917 (1981). "[T]he doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in ' "clean-cut and concrete form." ' " *New Mexicans*, 64 F.3d at 1499 (quoting *Renne v. Geary*, 501 U.S. 312, 322 (1991) (quoting *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947))).

Clearly, this Court's opinion in *Kidd I* resolved only one distinct issue that was "ripe" for decision — namely, whether the motion to compel arbitration should have been granted so as to require Kidd and Hampton to submit their claims to arbitration. As misinterpreted by the district court, however, the prior opinion of the Eleventh Circuit has been extended so as to purportedly resolve a question that was not presented in "clean-cut and concrete form" to that court — namely, whether Kidd and Hampton's claims may be adjudicated in district court if rejected by the NASD as not arbitrable. That issue was not ripe for the *Kidd I* court, both on constitutional and prudential grounds.

It was unripe on constitutional grounds because there was as yet no definite and concrete controversy. There were alleged wrongs to individuals that were required to be submitted to arbitration, but the outcome of the arbitration submission was still unknown. Until they were so submitted, the affect of the outcome of the arbitration process on the individual and class claims was not at issue. At the time of the prior appellate decision, neither the individual nor the classwide allegations had been addressed on the merits. This is still true today, even though the EEOC found probable cause in 1992 for classwide discrimination.

Assuming arguendo that the question of whether Kidd and Hampton's claims may return to the district court after submission to and rejection by the NASD might be viewed as a definite and concrete controversy, it was still not ripe for decision because the factual record was undeveloped. The Court of Appeals had no way of knowing in advance whether the submission to arbitration would result in a favorable or unfavorable finding on the merits of the claim of either or both plaintiffs, or whether (as actually occurred) the submission might result in a jurisdictional rejection by the NASD arbitrators based upon controlling authority. Any effort to address the multiple possibilities would have been entirely speculative. The district court erred by attributing such a speculative purpose to the mandate.

B. Equitable Can Not Rely On The Decision In *Kidd I* To Bar Adjudication Of Kidd And Hampton's Claims Because It Failed To Notify The Eleventh Circuit Of A Material Change In The Law.

The Eleventh Circuit's decision in *Kidd I* accepted Equitable's argument that Section 12(d) did not apply to prohibit the arbitration of Kidd and Hampton's class claims by the NASD. However, Equitable failed to inform the Eleventh Circuit that the precise argument is was making to the court regarding Section 12(d) had effectively been rejected by the NASD in an amendment to Section 12(d), issued before the decision in *Kidd I*.

Equitable conceded before the Eleventh Circuit that approximately eight months before the decision in *Kidd I* the NASD had "adopted Plaintiffs' interpretation that the NASD Code of Arbitration Procedures does not allow for arbitration of class action claims, whether brought by customers or by employees" and that this operated "as a prohibition on all class

action claims in the arbitration forum, whether brought by investors or employees." Appellee's Principal Brief, pp. 15, 24 (*Kidd II*). Nevertheless, Equitable did not inform the Eleventh Circuit in *Kidd I* that its argument as to the NASD's intent in fact had been rejected by the NASD itself in an amendment to Section 12(d) of the NASD Code.[3]

Every lawyer knows that he or she has a duty to report to the court adverse changes in the law or decisions contrary to the position he or she is urging the court to adopt, especially when the contrary authority is a formal amendment of the statute or administrative rule under review. Indeed, the Eleventh Circuit, in *Jorgenson v. County of Volusia*, 846 F.2d 1350, 1352 (11th Cir. 1988), held:

> The appellants purported to describe the law to the district court in the hope that the description would guide and inform the court's decision. With apparently studied care, however, they withheld the fact that the long-awaited decision by the Supreme Court of Florida had been handed down. The appellants are not redeemed by the fact that opposing counsel subsequently cited the controlling precedent. *The appellants had a duty to refrain from affirmatively misleading the court as to the state of the law.* They were

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3. Either the defendant knew of the NASD's amendment in the first appeal and sought to mislead the Court by continuing to insist that the plaintiffs' claims would not be rejected if "submitted" to the NASD for arbitration, or they did not know of such amendment and the first panel was misled by inadvertence. Either way, the defendant's erroneous argument was before the Court in *Kidd I* without benefit of the NASD's amendment to Section 12(d), which was crucial to that appeal.

> not relieved of this duty by the possibility that opposing counsel might find and cite the controlling precedent, particularly where, as here, a temporary restraining order might have been issued ex parte.

Id. at 1352 (emphasis added). *Accord Douglas v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344 (5th Cir. 1990) (Attorneys have "obligation to cite all relevant authority, including adverse case law.").

It would be a "manifest injustice" to leave the plaintiff without any forum to hear their claims merely because Equitable succeeded in misleading the court in *Kidd I*.

CONCLUSION

The decision of the Eleventh Circuit effectively rewrites the arbitration agreement by ignoring the NASD Code of Arbitration Procedure barring arbitration of any class claims, as well as claims of putative class members. Because Kidd and Hampton have presented their claims to the NASD as required by the agreement and the NASD has rejected those claims in accordance with their procedures, Kidd and Hampton's class claims, as well as their individual claims, may be determined by the federal district court. By ruling that the arbitration agreement *requires* that the claims be arbitrated, despite NASD procedures to the contrary, the Eleventh Circuit decision has left Kidd and Hampton without a forum for their claims. Therefore, Kidd and Hampton respectfully request this Court accept this petition and grant them a writ of certiorari.

Respectfully submitted,

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REBECCA J. ANTHONY
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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 30, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

96-6812

D. C. Docket No. CV93-C-0159-S

RONALD KIDD and THOMAS HAMPTON, on behalf of others similarly situated, and JAMES W. BROWN,

Plaintiff-Appellants,

versus

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES OF AMERICA, a corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

(June 30, 1997)

Before DUBINA, Circuit Judge, HILL and GIBSON*, Senior Circuit Judges.

PER CURIAM:

This is the second time we have been asked to review this case. Plaintiffs are securities agents who, prior to their

* Honorable John R. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

employment with Equitable Life Assurance Society (Equitable), signed contracts requiring them to arbitrate all employment disagreements. In 1993, they brought a Title VII action seeking to represent a class alleging racial discrimination by Equitable. Equitable moved to compel arbitration and to dismiss based upon the agents' agreements to arbitrate. The district court denied the motion and Equitable appealed.

On appeal, this court reversed the district court holding, that plaintiffs' employment contracts required them to arbitrate their claims. *Kidd v. Equitable Life Assurance Society*, 32 F.3d 516 (11th Cir. 1994) (*Kidd I*). We remanded the case to the district court for proceedings consistent with that opinion. *Id.* at 520. On remand, the district court granted Equitable's motion to compel arbitration and dismissed plaintiffs' class action without prejudice.

Approximately fifteen months later, plaintiffs moved the district court to reinstate their class action asserting that they had requested arbitration from the National Association of Securities Dealers (NASD) and had been refused because NASD will not arbitrate class claims, nor the individual claims of putative class members.

The district court denied plaintiffs' motion to reinstate because it believed reinstatement was foreclosed by this court's holding in *Kidd I*. This result is correct. The law of the case established in *Kidd I* controls this appeal. None of the exceptions to the law of the case doctrine apply here. Neither the relevant law nor the facts has changed.[1] Nothing contained herein,

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1. Plaintiffs argue that a clarifying amendment to NASD's Code of Arbitration Procedures Section 12(d)(3) which prohibits arbitration of class

(Cont'd)

however, constitutes any opinion as to the rights, if any, of the putative class members in this action to the arbitration of their individual claims as contemplated in their employment contracts with Equitable. The judgment is AFFIRMED.

(Cont'd)
claims exempts this appeal from application of the law of the case. Equitable notes the change was only a clarification. In any event, it is clear that the precise issue on appeal — the enforceability of plaintiffs' employment contracts — was clearly before the district court and the prior panel of this court.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DECIDED SEPTEMBER 16, 1994

Ronald KIDD; Thomas Hampton, on behalf of others similarly situated, Plaintiffs-Appellees, v. EQUITABLE LIFE ASSURANCE SOCIETY OF the UNITED STATES of America, a corporation, Defendant-Appellant, James W. Brown, Defendant.

No. 93-6571.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

32 F.3d 516; 1994 U.S. App. LEXIS 25541; 65 Fair Empl. Prac. Cas. (BNA) 1345; 65 Empl. Prac. Dec. (CCH) P43,307; 8 Fla. Law W. Fed. C 653

September 16, 1994, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Alabama. (No. CV93-C-159-S). U. W. Clemon, Judge.

DISPOSITION: REVERSED and REMANDED.

COUNSEL: For Appellant: James C. Huckaby, Jr., Beverly P. Baker, HASKELL, SLAUGHTER, YOUNG & JOHNSTON, Birmingham, AL. For Equitable Life: C. Geoffrey Weirich, R. Lawrence Ashe, Jr., Jocelyn J. Hunter, PAUL, HASTINGS, JANOFSKY & WALKER, Atlanta, GA.

For Ronald Kidd: Robert L. Wiggins, Jr., Byron R. Perkins, GORDON, SILBERMAN, WIGGINS & CHILDS, Birmingham, AL.

Appendix B

JUDGES: Before EDMONDSON, Circuit Judge, JOHNSON, Senior Circuit Judge, and PITTMAN,* Senior District Judge.

OPINION BY: JOHNSON

OPINION: JOHNSON, Senior Circuit Judge:

The Equitable Life Assurance Company ("Equitable") appeals from the district court's order denying Equitable's motion to compel arbitration of employment discrimination claims asserted by two of its securities sales representatives. On appeal, Equitable contends that certain applications the two representatives signed with the National Association of Securities Dealers ("NASD") mandate arbitration. For the reasons that follow, we reverse the district court.

I. STATEMENT OF THE CASE

Ronald Kidd and Thomas Hampton ("Appellees") are, respectively, present and former securities sales agents with Equitable and its wholly owned subsidiary, Equico Securities ("Equico"). Kidd joined Equitable in 1978, Hampton in 1987. In connection with their securities sales for Equitable, each completed an application, known as a "U-4" application, with the NASD.[1]

Kidd signed his first U-4 for Equitable in November 1978. This agreement contained no compulsory arbitration provision,

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* Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, Sitting by Designation.

1. The U-4 application is used to register securities dealers with different exchanges and associations.

but Kidd's signature bound him to "abide by the Statute(s), Constitution(s), Rules, and By-laws, as . . . amended from time to time of the [NASD]."

Later, U-4 forms were amended. The NASD added a provision requiring the applicant to submit to arbitration "any dispute, claim or controversy between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the [NASD]." This clause appears in a January 1983 application Kidd executed for Equico. Hampton's U-4, completed in 1987 for both Equitable and Equico, also contained the compulsory arbitration provision. At the time Appellees signed these U-4s, § 8 of the NASD Arbitration Code read, in relevant part:

> Any dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code, at the instance of:
>
> (1) a member against another member;
>
> (2) a member against a person associated with a member or a person associated with a member against a member; and. . . .

Code of Arbitration Procedure, NASD Manual (CCH) P 3708 (hereinafter "pre-amendment Code"). Pursuant to § 1 of the pre-amendment Code, arbitration was required for

> any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company:
>
> (1) between or among members;
>
> (2) between or among members and public customers, or others. . . .

NASD Manual (CCH) P 3701.

In January 1993, Appellees brought suit against Equitable alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C.A.* §§ 2000e—2000e-17 (West 1993), as amended, and section 1981 of the Civil Rights Act of 1866, *42 U S.C.A.* § 1981 (West 1993), as amended.[2] Equitable immediately moved the court to compel arbitration of Appellees' individual claims and to stay federal court proceedings. It argued that the NASD rules expressly require plaintiffs to arbitrate their claims.

After hearing oral argument, the district court — without an opinion — denied the motion. In October 1993, while this

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2. Kidd's complaint alleged Equitable discriminated against him in several aspects of his employment because he was black; Hampton claimed he suffered the same forms of discrimination, and that he was discharged because he is black. Both Kidd and Hampton filed complaints with the EEOC as early as 1989, alleging individual and class-wide racial discrimination. After four years of unsuccessful attempts at reconciliation, Kidd took his grievance to court where Hampton joined him in a class action.

appeal was pending, the NASD amended its rules to expressly provide for compulsory arbitration of employment-related disputes. See NASD Manual (CCH) P 3701 (1993). Equitable says Appellees are bound by this amendment because (1) they agreed to abide by all amendments and changes to the NASD rules and (2) the amendment simply "clarified" the NASD's intention that such claims be arbitrated under the pre-amendment NASD Code. Alternatively, if Appellees are not bound by this latest amendment, Equitable asserts that the pre-amendment Code mandates arbitration of the race discrimination claims.[3]

II. ANALYSIS

We review de novo the district court's denial of Equitable's motion to compel arbitration. See *Luckie v. Smith Barney, Harris Upham & Co., 999 F.2d 509, 512 (11th Cir.1993).*

Effective October 1, 1993, §§ 1 and 8 of the NASD Code of Arbitration were officially amended with the Securities and Exchange Commission's approval. Section 1 of the Code now provides "for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member." NASD Manual (CCH) P 3701 (emphasis added). Similarly, § 8(a) now states that "any dispute . . . eligible for submission under Part I of this Code between or among members and/or associated persons . . . arising in connection with the

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3. Since the 1993 amendment was passed while this case was pending on appeal, Equitable's argument on the application of the amendment was not raised below. Because the argument involves a question of law, we consider it anyway. See *McGinnis v. Ingram Equipment, 918 F.2d 1491, 1495 (11th Cir.1990).*

business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such member, shall be arbitrated under this Code." Id. at P 3708 (emphasis added). Obviously, if the amended NASD Code applies to Appellees, their claims must be submitted to arbitration.

Appellees claim they are not subject to the amended Code. According to them, the pre-amendment Code did not require arbitration of employment-related disputes. Thus, they view the amendment as a substantive change that should not be given retroactive application. We disagree.[4]

As noted, § 1 of the pre-amendment Code reads:

> This Code of Arbitration Procedure is prescribed and adopted . . . for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company:
>
> (1) between or among members;

---

4. Similarly, we reject Appellees' claims that arbitration should not be required because (1) the U-4 form is adhesive as it forces them to adhere to changes in the Code, (2) § 12(d) of the amended Code precludes arbitration of their disputes, (3) Equitable has waived the right to arbitrate by choosing to proceed at the EEOC, and (4) the NASD's arbitration procedures are inadequate.

> (2) between or among members and public customers, or others . . .

NASD Manual (CCH) P 3701.

Appellees urge this Court to adopt the Seventh Circuit's holding in *Farrand v. Lutheran Bhd., 993 F.2d 1253 (7th Cir.1993)* that the pre-amendment NASD Code did not mandate arbitration of employment-related disputes. In Farrand, the court held that the placement of the colon in § 1 limited the type of disputes required to be arbitrated to disputes "between or among members [or] between or among members and public customer, or others." *993 F.2d at 1254-55.* According to the court, the employee-stockbroker was not an "other" because including employees within the definition of "others" would render superfluous § 1's limitations on the persons subject to compulsory arbitration. Id.

We decline to adopt the Farrand decision. In our view, the colon modifies the clause immediately preceding it. See, e.g. William Strunk, Jr. & E.B. White, The Elements of Style 7-8 (3d ed. 1979) ("A colon tells the reader that what follows is closely related to the preceding clause."); Texas Law Review, Manual on Style 36 (4th ed. 1979) ("A colon functions primarily to introduce material promised or suggested in the clause preceding the colon."). Thus, the colon relates to the insurance clause as it immediately precedes the colon. Accordingly, § 1 requires arbitration for any dispute connected to an NASD member's business, except for disputes involving the insurance business of an NASD member that are (1) between NASD members or (2) between NASD members and public customers or others.[5]

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5. Equitable's personnel practices do not constitute a dispute over its "insurance business."

Moreover, we believe this reading accords with the Supreme Court's statement that:

> Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of a contract [or some other question].

Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983). The former Fifth Circuit expressed a similar sentiment. See *Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir.1979)* ("Unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted.").[6]

Furthermore, this reading of § 1 eliminates tensions in the NASD Code that occur under Farrand. Section 8 of the pre-amendment NASD Code requires an employee as a "person associated with a member" to arbitrate disputes or claims against his employer, the NASD member. By holding that an employee is not an "other" within the scope of § 1, Farrand eliminates § 8's requirement that employees arbitrate disputes with their

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6. The Farrand court acknowledged that it was not unreasonable to interpret the pre-amendment Code to require arbitration of employment disputes. By disregarding such a construction, Farrand conflicts with Cone and Wick.

employers. In contrast, because we find that "others" applies only to the insurance exception, § 8 retains full effect. Moreover, our reading also gives full effect to the language of the U-4 forms obligating Appellees to arbitrate "any dispute, claim, or controversy between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or other bylaws of the [NASD]." To hold otherwise would result in the strange situation wherein Appellees signed U-4 forms promising to arbitrate any disputes with their employer required to be arbitrated by the NASD at a time when the NASD rules did not require employees to arbitrate disputes with their employer. If the NASD did not mandate arbitration of employer-employee disputes, there would be no reason to require Appellees to sign U-4 forms promising to arbitrate such disputes.

Finally, ample evidence exists showing that the pre-amendment NASD Code required arbitration of employment disputes. In dismissing a 1982 challenge to the inclusion of mandatory arbitration provisions in U-4 forms, Judge, now Justice, Ruth Bader Ginsburg, noted that "compulsory arbitration became a feature of the Code of the NASD . . . before . . . 1975." *Association of Inv. Brokers v. Securities, Etc., 219 U.S. App. D.C. 259, 676 F.2d 857, 860 (D.C. Cir. 1982).* Judge Ginsburg further stated that "NASD rules mandate arbitration of employer-employee disputes, and did so, to the same extent, as they do now, before the development of [U-4 forms]." Id. at 861 (emphasis added). Moreover, in 1987, the NASD expressly stated that employment disputes between NASD members and their "registered representatives," such as Appellees, were subject to mandatory arbitration. See *52 Fed.Reg. 9232 (1987).* See also *58 Fed.Reg. 45,932 (1993)* (stating that NASD was amending language to clarify that employment disputes are, and have been, arbitrable).

Appendix B

III. CONCLUSION

We REVERSE the district court's order denying Equitable's motion to compel arbitration, and REMAND the case for further proceedings consistent with this opinion.

APPENDIX C — MEMORANDUM OF OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION ENTERED JULY 22, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-93-C--0159-S

RONALD KIDD and THOMAS HAMPTON, on behalf of others similarly situated,

Plaintiffs,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY, a corporation,

Defendant.

MEMORANDUM OF OPINION DENYING MOTION TO REINSTATE

The relevant factual and procedural development of this case is set forth in *Kidd v. Equitable Life Assurance Society of the U.S.*, 32 F. 3d 516 (11th Cir. 1994). This court is bound, of course, by that decision and mandate. The decision reversed this court's order denying the defendant's motion to compel arbitration; and the case was remanded "for further proceedings consistent with the decision of the circuit." *Id.* at 520.

Following the mandate in *Kidd*, the court stayed the proceedings in this case while plaintiffs pressed their claims in

arbitration. Plaintiffs thereafter sought to arbitrate their claims as class claims on three separate occasions — most recently on February 1, 1996. On each occasion, the National Association of Securities Dealers ("NASD") refused to arbitrate their claims on the grounds that class claims are not subject to arbitration. "Unwilling to relinquish their class claims as the price of arbitration of their individual claims . . . ," plaintiffs have now asked the court to reinstate the case to its active docket for further proceedings and trial. Plaintiff's Motion, p. 4.

The practical effect of the circuit's decision in *Kidd* is to bar as Fed.R. Civ. Proc. 23 class representatives all securities sales agents who have executed employment contracts ("U-4 forms") with their employers. It may be safely assumed that all employed securities sales agents execute U-4 forms as a condition of their employment. Though the *Kidd* opinion does not speak directly to the issue, the circuit panel surely realized that the arbitration requirement imposed on securities sales agents disqualifies them from serving as class representatives in employment cases to be litigated in court. The *raison d'etre* of arbitration is the avoidance of litigation.

Although this judge disagrees with the circuit's decision and mandate, he is bound by it. The Motion to Reinstate therefore must be overruled. On appeal, the court will not at all be displeased by a reversal on this issue.

DONE this the 19th day of July, 1996

s/ U.W. Clemon
UNITED STATES DISTRICT JUDGE
U. W. CLEMON

APPENDIX D — ORDER OF DISMISSAL WITHOUT PREJUDICE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION ENTERED NOVEMBER 29, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NUMBER

93-C-0159-S

RONALD KIDD, et al.,

Plaintiffs,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES OF AMERICA,

Defendant.

ORDER OF DISMISSAL WITHOUT PREJUDICE

Based on the mandate of the Eleventh Circuit, defendant's Motion to Require Arbitration is GRANTED.

This cause is hereby DISMISSED, without prejudice to the right of plaintiffs to cause its reinstatement upon exhaustion of the arbitration procedures and/or reversal of the Eleventh Circuit's opinion by the United States Supreme Court.

James W. Brown's intervention motion is treated as a new

action. The Second Amended Complaint (minus all references to Ronald Kidd and Thomas Hampton) shall be given a new case number by the Clerk of the Court. The period of discovery is hereby EXTENDED for nine months.

The costs of this action are hereby taxed against plaintiffs.

DONE this 28th day of November, 1994.

s/ U.W. Clemon
UNITED STATES DISTRICT JUDGE
U. W. CLEMON

APPENDIX E — DENIAL OF DEFENDANT'S MOTION TO COMPEL ARBITRATION, STAY PROCEEDINGS AND DISMISS THE CLASS CLAIMS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED MARCH 11, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION FILE NO. Cv-93-C-0159-S

RONALD KIDD and THOMAS HAMPTON, on behalf of others similarly situated,

Plaintiffs,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY, a corporation,

Defendant.

DEFENDANT'S MOTION TO COMPEL ARBITRATION, STAY PROCEEDINGS AND DISMISS THE CLASS CLAIMS

COMES NOW Defendant, The Equitable Life Assurance Society of the United States (hereinafter "Defendant"), and moves this Court to compel arbitration of the individual claims of Ronald Kidd and Thomas Hampton pursuant to their respective binding and enforceable agreements, to stay proceedings in this case pending the outcome of arbitration, and to dismiss the class claims herein due to inadequacy of

representation. The legal bases for Defendant's Motion are set forth in the attached Memorandum of Law.

[stamp]
DENIED

s/ U.W. Clemon 6/18/93
JUDGE DATE

APPENDIX F — CORRESPONDENCE OF NASD ARBITRATION & MEDIATION

NASD **Arbitration & Mediation**

National Association of Securities Dealers, Inc. * NASD Financial Center * 33 Whitehall Street * New York, NY 10004 * Fax 212-858-4429
Washington DC Satellite office at: 1735 K Street, NW – 10th Floor * Washington, DC 20006 * Fax 202-728-6952

February 1, 1996

Byron R. Perkins, Esq.
Gordon, Silverman, Wiggins & Childs
Fourteen Hundred Southtrust Tower
Birmingham, AL 35203-3204

Subject: NASD Arbitration Number 95-05365
Ronald Kidd and Thomas Hampton v. The Equitable Life Assurance Society

Dear Mr. Perkins:

Please be advised that this office is in receipt of your Statement of Claim and attachments thereto. However, we note the following deficiencies:

- As you have been advised previously, you may *not* pursue a class action in NASD arbitration pursuant to Section 12(d) of the Code of Arbitration Procedure. This case will be held in abeyance, at your request, for an additional thirty (30) days *only*. You *must* notify this office at that time if you wish to pursue this matter through arbitration, *not* as a class action or if you will pursue the class action in another forum.

Appendix F

In addition, if you wish to pursue this through arbitration, please be advised that claimant Hampton's Uniform Submission Agreement was not completed correctly by the notary. The *jurat* was not completed.

The claim will not be served until the noted deficiencies are corrected. ***If the above listed deficiencies are not corrected within 30 days, the case will be closed without prejudice.***

ALL CORRESPONDENCE (INCLUDING CHECKS) SENT TO THIS OFFICE *MUST* BE CLEARLY MARKED WITH THE APPROPRIATE NASD CASE NUMBER.

Very truly yours,

s/ Christine Holder
Christine Holder
Senior Legal Assistant
NY/212-858-4200

CF:MM:LC15A
lr:9/95

RECIPIENTS:
Byron R. Perkins, Esq., Ronald Kidd

Appendix F

NASD Arbitration & Mediation

National Association of Securities Dealers, Inc. * NASD Financial Center * 33 Whitehall Street * New York, NY 10004 * Fax 212-858-4429
Washington DC Satellite office at: 1735 K Street, NW – 10th Floor * Washington, DC 20006 * Fax 202-728-6952

March 7, 1996

Byron R. Perkins, Esq.
Gordon, Silverman, Wiggins & Childs
Fourteen Hundred Southtrust Tower
Birmingham, AL 35203-3204

Subject: NASD Arbitration Number 95-05365
Ronald Kidd and Thomas Hampton v. The Equitable Life Assurance Society

Dear Mr. Perkins:

Please be advised that this office is in receipt of your Statement of Claim and attachments thereto. However, we note the following deficiencies:

- As stated in my letter dated February 1, 1996, you *MAY NOT* pursue a class action in NASD arbitration. You *must* advise this office if you wish to pursue this matter through arbitration or as a class action in another forum. Please advise us *AS SOON AS POSSIBLE.*

The claim will not be served until the noted deficiencies are corrected. ***If the above listed deficiencies are not corrected within 30 days, the case will be closed without prejudice.***

Appendix F

ALL CORRESPONDENCE (INCLUDING CHECKS) SENT TO THIS OFFICE *MUST* BE CLEARLY MARKED WITH THE APPROPRIATE NASD CASE NUMBER.

Very truly yours,

s/ Christine Holder
Christine Holder
Senior Legal Assistant
NY/212-858-4200

CF:MM:LC15A
lr:9/95

RECIPIENTS:
Byron R. Perkins, Esq., Ronald Kidd

APPENDIX G — RELEVANT STATUTES

42 U.S.C.A. § 1981

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 — CIVIL RIGHTS
SUBCHAPTER 1 — GENERALLY

Current through P.L. 105-15, approved 5-15-97

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

* * *

Appendix G

42 U.S.C.A. § 2000e-2

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 — CIVIL RIGHTS
SUBCHAPTER VI — EQUAL EMPLOYMENT OPPORTUNITIES

Current through P.L. 105-15, approved 5-15-97

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization —

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

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(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported,

controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if —

(1) the occupancy of such position, or access to the premises in or upon which any

part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of

such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

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(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if —

> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

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(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws —

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had —

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such

person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to —

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action nor precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

* * *

Appendix G

42 U.S.C.A. § 2000e-5

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 — CIVIL RIGHTS
SUBCHAPTER VI — EQUAL EMPLOYMENT OPPORTUNITIES

Current through P.L. 105-15, approved 5-15-97

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent: contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor

organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as

practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

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1. So in original. Probably should be subsection "(b)".

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(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto

upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the

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Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the

action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections[2] (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United Status district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the

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2. So in original. Probably should be "subsection".

employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

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(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason over than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same

action in the absence of the impermissible motivating factor, the court —

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any

proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

* * *

9 U.S.C.A. § 4

UNITED STATES CODE ANNOTATED
TITLE 9. ARBITRATION
CHAPTER 1 — GENERAL PROVISIONS

Current through P.L. 105-15, approved 5-15-97

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising

out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Appendix G

15 U.S.C. § 78*o*-3

§ 78*o*-3. Registered securities associations

(a) Registration; application

An association of brokers and dealers may be registered as a national securities association pursuant to subsection (b) of this section, or as an affiliated securities association pursuant to subsection (d) of this section, under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 78s(a) of this title, by filing with the Commission as application for registration in such form as the Commission, by rule, may prescribe containing the rules of the association and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) Determinations by Commission requisite to registration of applicant as national securities association

An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that —

> (1) By reason of the number and geographical distribution of its members and the scope of their transactions, such association will be able to carry out the purposes of this section.
>
> (2) Such association is so organized and has the capacity to be able to carry out the purposes of this chapter and to comply, and

(subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this chapter, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, and the rules of the association.

(3) Subject to the provisions of subsection (g) of this section, the rules of the association provide that any registered broker or dealer may become a member of such association and any person may become associated with a member thereof.

(4) The rules of the association assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the association, broker, or dealer.

(5) The rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls.

(6) The rules of the association are

designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of this association.

(7) The rules of the association provide that (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this chapter, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association, by expulsion, suspension, limitation of activities, functions,

and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

(8) The rules of the association are in accordance with the provisions of subsection (h) of this section, and, in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.

(9) The rules of the association do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.

(10) The requirements of subsection (c) of this section, insofar as these may be applicable, are satisfied.

(11) The rules of the association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be distributed or published by any member or person

associated with a member, and the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.

(12) The rules of the association to promote just and equitable principles of trade, as required by paragraph (6), include rules to prevent members of the association from participating in any limited partnership rollup transaction (as such term is defined in paragraphs (4) and (5) of section 78(n)(h) of this title) unless such transaction was conducted in accordance with procedures designed to protect the rights of limited partners, including —

(A) the right of dissenting limited partners to one of the following:

* * *

(2)

Supreme Court, U.S.
FILED
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No. 97-573

In The

Supreme Court of the United States

October Term, 1997

RONALD KIDD and THOMAS HAMPTON, on behalf of others similarly situated,

Petitioners,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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21 pp

QUESTION PRESENTED

Did the Eleventh Circuit commit error when it held that the law of the case doctrine prevented it from deciding again precisely the same issue an earlier panel had decided three years earlier, when the law and the facts had not changed?

LIST OF PARTIES

Petitioners are Ronald Kidd and Thomas Hampton.

Respondent is The Equitable Life Assurance Society of the United States.

STATEMENT PURSUANT TO RULE 29.6

Respondent lists the following parent companies and nonwholly owned subsidiaries: The Equitable Companies Incorporated (parent company).

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STATEMENT OF THE CASE

There are no appropriate grounds for granting a writ of certiorari in this case. Petitioners are asking this Court to review a straightforward application of the law of the case doctrine by the Eleventh Circuit. The case turns on its own facts. No questions of national importance are presented, and there is no conflict among the lower courts. There also is no error in the lower court's decision. The Eleventh Circuit simply declined to decide again precisely the same question it already had decided once, on a prior appeal three years ago involving these same parties in this same case, because there had been no change in the law or the facts.

In both appeals, *Kidd I* and *Kidd II*,[1] the Petitioners brought the same question before the Eleventh Circuit — whether they were required to arbitrate their alleged employment discrimination dispute with their employer pursuant to the National Association of Securities Dealers ("NASD") arbitration procedures to which they had contractually agreed in their securities industry "U-4" registration statements. In both appeals, Petitioners raised the same contention in an attempt to avoid their commitment to arbitrate rather than litigate — that arbitration could not be required because they had filed their lawsuit as alleged representatives of a putative Rule 23 class, and Section 12(d) of the NASD Code of Arbitration Procedure excluded class claims from arbitration. *See* NASD Manual (CCH) Rule 10301(d)(3) (1997) ("Section 12(d)"). The Eleventh Circuit explicitly considered and rejected this defense in the

---

1. The Eleventh Circuit's first decision in the case was issued on September 16, 1994. *See Kidd v. Equitable Life Assurance Soc'y of Am.*, 32 F.3d 516 (11th Cir. 1994) (hereinafter "*Kidd I*"). The Eleventh Circuit's second decision was issued on June 30, 1997 and is unreported. *See Kidd v. Equitable Life Assurance Soc'y of Am.*, No. 96-6812 (11th Cir. June 30, 1997) (table decision at 119 F.3d 11) (hereinafter "*Kidd II*").

first appeal: "[W]e reject [Petitioners'] claims that arbitration should not be required because . . . § 12(d) of the amended Code precludes arbitration of their disputes. . . ." *Kidd I*, 32 F.3d at 518 n.4.

Nevertheless, despite this explicit rejection, Petitioners returned to the Eleventh Circuit a second time to raise the exact same issue. In *Kidd II*, Petitioners claimed that the law of the case established in the first appeal was not dispositive because two things had happened: (1) the NASD had clarified, through an administrative Rule Change, that Section 12(d) prevented the arbitration of class claims, just as Petitioners had argued in *Kidd I*; and (2) the NASD apparently had rejected Petitioners' demand for arbitration of their claims in a class action format, just as Petitioners had predicted in *Kidd I*.

The *Kidd II* panel declined to reconsider Petitioners' arguments, holding that it was precluded from deciding the exact same issue a second time:

> **The law of the case established in *Kidd I* controls this appeal. None of the exceptions to the law of the case doctrine apply here. Neither the relevant law nor the facts has changed.**

Kidd II, slip. op. at 3 (emphasis added).

There was no error in this decision. The law had not changed between the two appeals; instead, the NASD simply had clarified Section 12(d)'s original intent, consistent with Petitioners' interpretation. The facts had not changed either; instead, the NASD apparently applied its procedures in the exact way Petitioners always had predicted.

MISSTATEMENTS OF FACTS AND LAW IN THE PETITION

Pursuant to Supreme Court Rule 15.2, Respondent identifies the following misstatements of fact and law in the Petition:

1. There are evidentiary defects and factual misstatements that impact the Court's ability to decide on the merits the questions presented in the Petition. Petitioners claim that, following the *Kidd I* decision in 1994, they submitted their claims to the NASD for arbitration on three different occasions, and that on each occasion the NASD refused to accept their claims due to Section 12(d). *See* Petition at 2-3. In the lower courts, however, these assertions were never supported by evidence in the record, and Petitioners now have compounded the record deficiencies by alleging new facts and including new non-record materials in their Petition in this Court.

Throughout the *Kidd II* proceedings, Petitioners' only proof of the purported submission and rejection of their arbitration demands consisted of two quotes from two alleged letters from the NASD, set forth within the body of their Motion to Reinstate. (Record 28 at 2-3.) The absence of any legitimate record evidence of these matters was brought to Petitioners' attention in May 1996 by counsel for Respondent, who had never been served with copies of the purported NASD arbitration claims. *See* Defendant's Memorandum in Opposition to Plaintiffs' Motion to Reinstate at 5 n.2. In response, Petitioners provided to counsel for Respondent a single, undated document entitled "Statement of Claim for Arbitration." *See* Respondent's *Kidd II* brief at 10 n.4. Petitioners did not verify and file either this "Statement of Claim" or any other with the court, nor did they verify and file any of the NASD letters quoted in the body of their Motion to Reinstate.

In their Petition to this Court, Petitioners exacerbate the record deficiencies by making brand new factual assertions and attaching to the Petition new "evidence" that has never been provided to Respondent or made a part of the record in this case. In their Motion to Reinstate in the district court, Petitioners asserted that the three alleged NASD rejections were dated November 15, 1995, December 17, 1995, and February 1, 1996. (Record 28 at 2-3.) In this Court, Petitioners now identify different dates for the purported NASD rejections, and attach a March 7, 1996 NASD letter that has never been identified, disclosed, or discussed in any way, at any time in this case. *See* Petition Appendix F at 22a.

Accordingly, for obvious reasons, Respondent reserves its right to challenge Petitioners' unsupported assertions regarding the NASD's purported treatment of their demands following *Kidd I*.

2. In their Petition, Petitioners have mischaracterized the NASD's April 20, 1994 clarification of Section 12(d) of the NASD Arbitration Code as a substantive change.[2] For example, Petitioners state that "at the time arbitration was compelled on remand, the version of Section 12(d) that was before [the Eleventh Circuit] in the last appeal was no longer in existence." Petition at 4. This assertion falsely implies that the NASD's clarification actually created some new rule, and that the NASD rule in effect during *Kidd I* was not in effect during *Kidd II*. To the contrary, both the NASD and the SEC stated that the additional language was added simply to clarify the "**original intent** of the section." 59 Fed. Reg. at 22033 (emphasis added). Thus, the same arbitration rules were in effect throughout this case, both in *Kidd I* and *Kidd II*.

---

2. *See* Order Approving NASD Proposed Rule Change Relating to Exclusion of Class Action Claims from Arbitration, Exchange Act Release No. 33939, 59 Fed. Reg. 22032 (1994) (attached as Ex. D to Respondent's *Kidd II* brief).

3. Petitioners have included in their Petition false and wholly unsupported accusations regarding when Respondent allegedly became aware of the NASD rule clarification, which was published after submission of the *Kidd I* briefs but before the *Kidd I* oral arguments and decision. Specifically, Petitioners charge that Respondent "breached the duty to report to the court adverse changes in the law." Petition at 23. This is not true. Petitioners cite no evidence — because there is none — that Respondent or its attorneys had knowledge of the NASD clarification at any time prior to the oral argument or decision in *Kidd I*.[3]

REASONS FOR DENYING THE WRIT

The Petition should be denied because there is nothing certworthy in the Eleventh Circuit's *Kidd II* decision, which is a narrow holding based entirely on the law of the case doctrine. The decision is not in conflict with this Court's precedent, presents no conflict that exists among the lower courts, and involves no question of national importance.

The Petition also should be denied because the reasons put forward by Petitioners are decidedly insufficient. Petitioners essentially argue that a writ of certiorari should be granted for two reasons: (1) the Eleventh Circuit's *Kidd II* decision purportedly "rewrote" Petitioners' arbitration agreements by requiring them to submit their claims to arbitration even though the NASD did not allow arbitration of class claims; and (2) the Eleventh Circuit improperly applied the law of the case doctrine even though there were changed circumstances that would have allowed it to depart from its earlier decision. Petitioners' first argument is nothing more than an attempt to have this Court review *Kidd I*, which it cannot do. Petitioners had the opportunity

3. Notably, Petitioners also offer absolutely no explanation for why they did not bring the rule clarification to the court's attention.

to seek certiorari on those issues three years ago, which they declined to exercise. Petitioners' second argument fails because there was no error in the Eleventh Circuit's straightforward application of the law of the case doctrine in *Kidd II*. Thus, there is no sufficient basis for granting a writ of certiorari in this case.

I.

THERE IS NOTHING CERTWORTHY IN THE *KIDD II* DECISION.

Review by this Court is unwarranted and inappropriate because the *Kidd II* decision by the Eleventh Circuit involves no legal issue of any national import and turns on its own facts, and because the record deficiencies hamper the Court's ability to decide the questions presented on their merits. The brief decision by the Eleventh Circuit in *Kidd II* essentially consists of two holdings: (1) the issue before the second panel "was clearly before . . . the prior panel of this court," and therefore the "law of the case established in *Kidd I* controls this appeal," and (2) no exception to the law of the case doctrine was applicable because "[n]either the relevant law nor the facts has changed." *Kidd II*, slip. op. at 3 & n.1. Neither of these holdings conflict with any precedent of this Court. Neither of these holdings involves issues that are in conflict in the lower courts. Petitioners acknowledge as much in their Petition, wholly failing to identify any conflict between *Kidd II* and the decisions of this Court or the lower courts.

This case also turns on its own facts, and therefore any decision by this Court is unlikely to have an impact on any other case. The factual scenario that was before the Eleventh Circuit in *Kidd II* assuredly stands alone: Following the first panel's decision in *Kidd I*, Messrs. Kidd and Hampton deliberately submitted their claims to the NASD as the representatives of a

putative class, rather than individually, despite Section 12(d)'s exclusion of such claims from the arbitration forum and despite the first panel's express ruling that Section 12(d)'s exclusion did not relieve them of their contractual agreement to arbitrate. Petitioners identify no other persons — because it seems certain that none exist — who are involved in a similar situation who would benefit from a decision by this Court.

Review by this Court also is inappropriate due to the record deficiencies. As explained above, there is no evidence in the record to support Petitioners' assertions that they submitted their claims to the NASD on three occasions after the *Kidd I* decision, and that each time the NASD rejected the claims on the basis of Section 12(d). There also is the new problem created by the Petition itself. In Appendix F, Petitioners have attached a purported letter from the NASD that has **never** been previously disclosed or discussed in this case, at any time. *See* Petition at 22a. The purported letter is dated March 7, 1996, yet in *Kidd II* Petitioners asserted that the third and final rejection by the NASD occurred in a letter dated February 1, 1996. *See, e.g.*, Petitioners' *Kidd II* Reply Brief at 3 ("the NASD refused to arbitrate the plaintiffs' claims on three separate occasions — most recently on February 1, 1996"). Thus, even if there were a certworthy issue in the Eleventh Circuit's *Kidd II* decision, the deficient and uncertain state of the record provides independent grounds for not granting a writ of certiorari.

II.

THIS COURT CAN REVIEW ONLY *KIDD II*'S LAW OF THE CASE DECISION, NOT *KIDD I*'S ARBITRABILITY DECISION.

Petitioners' first argument for granting a writ of certiorari — that the Eleventh Circuit "rewrote" the arbitration agreement by requiring arbitration and refusing to reinstate their claims

even though the NASD arbitration rules did not allow for arbitration of class claims — is insufficient because it is based entirely on the first panel's decision in *Kidd I*, not the second panel's decision in *Kidd II*. It was in 1994, in *Kidd I*, that the Eleventh Circuit required Petitioners to submit their claims to arbitration. In *Kidd II*, the Eleventh Circuit merely held that reinstatement of Petitioners' claims was foreclosed by the law of the case, as established in *Kidd I*. Thus, the applicability of the law of case doctrine is the only question for which Petitioners can seek a writ of certiorari. The time to seek a writ based on the *Kidd I* arbitrability decision expired years ago, on December 15, 1994.

Petitioners attempt to mask their untimely petition by quoting the *Kidd II* decision in a misleading way. In the Petition, Petitioners describe the *Kidd II* decision as follows: "The panel opinion states, 'plaintiffs' employment contracts required them to arbitrate their claims.' *Kidd II*, slip op. at 2." Petition at 10. The portion of *Kidd II* quoted by Petitioners, however, is merely *Kidd II*'s recounting of the *Kidd I* decision. The full quotation makes this clear:

> On appeal, this court reversed the district court[,] holding[ ] that plaintiffs' employment contracts required them to arbitrate their claims. *Kidd v. Equitable Life Assurance Society*, 32 F.3d 516 (11th Cir. 1994) (*Kidd I*).

Kidd II, slip op. at 2.

In *Kidd II*, the Eleventh Circuit did not decide any of the arbitrability issues now urged by Petitioners as reasons for granting a writ, nor could it, due to the law of the case established in *Kidd I*. Accordingly, Petitioners' argument that the Eleventh Circuit misapplied or "rewrote" the terms of the NASD arbitration agreement is not properly before this Court, and their petition for a writ of certiorari therefore must be denied.

III.

THERE WAS NO ERROR IN THE DECISION IN *KIDD II* THAT REINSTATEMENT WAS BARRED DUE TO THE LAW OF THE CASE.

In *Kidd II*, the Eleventh Circuit correctly held that its prior decision in *Kidd I* barred reinstatement of Petitioners' claims. It did so because "[n]either the relevant law nor the facts has changed," and thus none of the exceptions to the law of the case doctrine was applicable. *Kidd II*, slip op. at 3. There was no error in this holding.

In *Kidd I*, the Eleventh Circuit expressly held that Petitioners were contractually bound by the NASD Code of Arbitration Procedures to arbitrate their disputes with Respondent, regardless of the effect of Section 12(d) on their attempt to assert those claims in a class action rather than in individual lawsuits. 32 F.3d at 518-19. Petitioners returned three years later and asked the *Kidd II* panel to decide the same question, despite the fact that the legal bases for the *Kidd I* decision had not changed at all. The only difference in the second appeal was Petitioners' factually unsupported allegation that the NASD had prevented them from arbitrating their claims in the form of a class action, rather than individually, pursuant to Section 12(d). This eventuality, however, was explicitly raised by Petitioners in *Kidd I*, and therefore did not constitute "new and substantially different evidence." *See Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1986); *see also infra* Section III.C. Accordingly, the *Kidd II* panel was precluded by the law of the case from deciding the issue differently.

A. The Law of the Case Doctrine Has Only Three Narrow Exceptions, None of Which Was Applicable in *Kidd II*.

The law of the case doctrine is well established in the Eleventh Circuit:

> [B]oth the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case.

United States v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982). The court of appeals' decision "represents the law of the case not only as to matters decided explicitly but also as to those decided by necessary implication." *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1196 (11th Cir.), *modified on other grounds*, 997 F.2d 1340 (11th Cir. 1993). Only "the most cogent of reasons" will justify a failure to follow the earlier appellate decision. *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974).

Only three narrow exceptions allow a court to act contrary to a prior appellate decision in the same case:

> (1) when new and substantially different evidence is presented subsequent to the appeal; (2) when controlling authority has been rendered, contrary to the law of the appellate decision; (3) when the prior decision was clearly erroneous and would work a manifest injustice if implemented.

Leggett v. Badger, 798 F.2d 1387, 1389 (11th Cir. 1986). The Eleventh Circuit has emphasized "the need to read and apply these exceptions narrowly." *Id.* at 1389 n.2. The prior appellate decision must be followed "unless the court is certain that one

of the three [exceptions] specifically and unquestionably applies." *Id.* In this case, none of the three narrow exceptions would have allowed the *Kidd II* panel to rule contrary to *Kidd I*.

B. There Was No "Change in Controlling Authority" Between *Kidd I* and *Kidd II*.

In *Kidd II*, Petitioners argued that the "controlling authority relied on by the Court in *Kidd I* has been changed," referring to the April 20, 1994 NASD clarification. *See* Petitioners' *Kidd II* Brief at 22. The *Kidd II* panel correctly concluded, however, that there had been no change in the relevant law. The court found it unnecessary to discuss its holding in any detail, but there are several obvious bases for such a finding.

First, as a matter of timing, the NASD clarification was not new authority that came after *Kidd I*. The NASD clarification was approved by the Securities and Exchange Commission ("SEC") on April 20, 1994, five months prior to *Kidd I*. The proposed clarification was first published even earlier, on January 24, 1994.[4] Accordingly, the clarification was not post-*Kidd I*.

Second, the NASD clarification was not a "change," it was a clarification of existing rules. This clarification worked no fundamental change in the NASD Code of Arbitration Procedures; it simply advised that Section 12(d) should be interpreted as a prohibition on the pursuit of class claims in the arbitration forum, both by investors and registered representatives, just as Petitioners had argued was the rule in *Kidd I*. Petitioners failed to persuade the *Kidd I* panel that such

4. *See* Proposed Rule Change by NASD Relating to Exclusion of Class Action Claims from Arbitration, Exchange Act Release No. 33506, 59 Fed. Reg. 4299 (1994) (attached as Ex. D to Respondent's *Kidd II* Brief).

a prohibition justified relieving them of their contractual obligation to arbitrate their claims, and the NASD rule clarification provided no basis for a contrary decision by a second panel three years later.

Finally, the NASD clarification did not rise to the level of new "controlling [legal] authority [that] compels a contrary decision of law." *Williams v. City of Dothan*, 818 F.2d 755, 758 (11th Cir. 1980), *modified*, 828 F.2d 13 (11th Cir. 1987). The standard for rejecting a prior appellate decision based on new authority is a demanding one: "The law of the case will be disregarded only when the court has a clear conviction of error with respect to a point of law on which its previous decision was predicated." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981). "[M]ere doubt on our part is not enough to open the point for full reconsideration." *Id.*

In *Kidd II*, Petitioners essentially offered nothing more than an additional citation for their previously proffered interpretation of Section 12(d). Using the NASD clarification, Petitioners were able to argue that their interpretation of the NASD Code of Procedures had been proven correct. At best, they were able to "make a more persuasive argument . . . than we would have thought likely when the case was last here," *Fogel*, 668 F.2d at 109, but their additional citation hardly meets the demanding standard that must be met for a court to rule contrary to a prior appellate decision in the same case.

Moreover, in any event, the *Kidd I* decision was not predicated on Section 12(d). Instead, it was predicated on a finding that the NASD procedures required the arbitration of employment-related disputes, and that those procedures were applicable to Petitioners. *See Kidd I*, 32 F.3d at 518-19. In *Kidd I*, the Eleventh Circuit disposed of Petitioners' Section 12(d)(3) argument in a footnote, without discussion: "[W]e reject

[Plaintiffs'] claims that arbitration should not be required because . . . § 12(d) of the amended Code precludes arbitration of their disputes. . . ." *Id.* at 518 n.4. The fact that Plaintiffs sought to assert their claims as the representatives of a putative class, rather than individually, and that Section 12(d) might not allow them to pursue their claims in that fashion, obviously were insufficient reasons for relieving Petitioners of their agreement to arbitrate. Thus, the NASD rule clarification, which tracked the argument already raised and rejected in *Kidd I*, could not be considered new "controlling" authority that compelled a contrary decision in *Kidd II*.

C. The *Kidd I* Mandate Did Not Leave Open the Question of Reinstatement in Federal Court After NASD Rejection of the Class Claims.

Petitioners devote much of their Petition to arguing that the mandate in *Kidd I* left open the possibility of reinstatement of their class claims in the district court after rejection by the NASD. *See* Petition at 16-22. Petitioners argue that the mandate was required to provide for such reinstatement, for constitutional reasons, because the question of post-rejection reinstatement was not "ripe" when *Kidd I* was decided. *Id.*

Petitioners' argument ignores the fact that, in *Kidd I*, they repeatedly argued to the Eleventh Circuit that their class claims would be rejected by the NASD pursuant to Section 12(d) because they were going to insist on proceeding in a class action format rather than individually. *See, e.g.*, Petitioners' *Kidd I* Brief at 27, 29, 49. In fact, Petitioners plainly advised the Eleventh Circuit that they intended to bring Section 12(d)'s prohibition on class claims into play and then seek reinstatement in the district court:

> It will make no sense to reverse the denial of arbitration and send this case to the NASD only to have it

> immediately removed back to the district court on the filing of a mere notice that plaintiffs "submit" their claims as a class action, thereby triggering the plain language of § 12(d)(1) of the NASD Code. Futile gestures are not required.

Id. at 28; *see also id.* at 29 ("the named plaintiffs will 'submit' their claims as a class action under Section 12(d)(1) if the motion to compel arbitration and stay proceedings is ever granted").[5]

Accordingly, it strains credulity to argue, as Petitioners now do, that the issue of post-rejection reinstatement was never adequately presented to the *Kidd I* panel. *See* Petition at 21. Petitioners gave full warning to the Eleventh Circuit of their deliberate tactical decision to submit their claims to the NASD as part of a class action, and of the virtual certainty that the NASD would refuse to permit them to be arbitrated in that format pursuant to Section 12(d). If the Eleventh Circuit had intended to advise Petitioners that reinstatement in the district court could be sought upon the NASD's rejection of such class action claims, it surely could have done so in its opinion. Instead, the court unequivocally stated: "[W]e reject [Petitioners'] claims that arbitration should not be required because . . . § 12(d) of the amended Code precludes arbitration of their disputes. . . ." *Kidd I*, 32 F.3d at 518 n.4. This opinion thus did not leave open the question of post-rejection reinstatement, whether on ripeness or any other grounds.

Both the district court and the Eleventh Circuit correctly recognized the finality of the *Kidd I* panel's decision. There is absolutely no reason for this Court to grant a writ of certiorari to review that very straightforward conclusion.

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5. Petitioners' unequivocal statements in *Kidd I* regarding their intention to submit their claims to the NASD in a class action format, despite Section 12(d)'s prohibition, are in direct conflict with their present ripeness argument, which they admit is a concept that "involves uncertain and contingent events that **may not occur**." Petition at 21 (emphasis added).

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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